

Frequently Asked Questions on Filing Requirements for Build America Bonds and Recovery Zone Economic Development Bonds

The Form 8038-CP, *Return for Credit Payments to Issuers of Qualified Bonds*, is the return used to claim refundable tax credits payable to issuers of qualified build America bonds (BABs) and recovery zone economic development bonds (RZEDBs) under Sections 54AA, 1400U-2 and 6431 of the Internal Revenue Code (Code). These bonds and the federal direct payment credits were authorized by the American Recovery and Reinvestment Act of 2009 (ARRA). On April 3, 2009, Notice 2009-26 was issued providing initial guidance for the new bonds and the implementation plans for the refundable credit payment procedures for these bonds.

Section 5 of Notice 2009-26 provides instructions for reporting the original issuance of BABs and RZEDBs on Form 8038-G, *Information Return for Tax-Exempt Governmental Obligations*. In February 2010, the IRS published a new Form 8038-B, *Information Return for Build America Bonds and Recovery Zone Economic Development Bonds*. Issuers should report the issuance of BABs and RZEDBs on the new Form 8038-B instead of Form 8038-G. The IRS also published a new Form 8038-CP to claim the refundable tax credit. The new form will allow the issuer, or its designee, the option to receive payment by direct deposit.

A number of questions have arisen related to filing Form 8038-B and Form 8038-CP. These questions and answers are intended to illustrate use of the new Form 8038-CP and the new Form 8038-B and to provide additional guidance for these forms. Additionally, the IRS has established an email address to which questions concerning the filing of Forms 8038-B and 8038-CP may be submitted. Questions may be e-mailed to TaxExemptBondQuestions@irs.gov with "Form 8038-B Question" or "Form 8038-CP Question" in the subject line. Please include a description of your question, a return email address, a contact name and phone number in the email.

Additional frequently asked questions and answers on this topic may be posted from time to time.

Questions and Answers Relating to Form 8038-B

Q-1. How is the yield entered on Form 8038-B calculated for BABs (Direct Pay) and for RZEDBs?

A-1. Issuers should calculate the yield on BABs (Direct Pay) and RZEDBs for purposes of the arbitrage rules by applying the rules contained in section 148 and the regulations thereunder, but by reducing the amount of interest paid on

the bond by the credit allowed under section 6431. (The amount received may be less than the amount allowed due to federal and other liability offsets.)

Q-2. If both tax-exempt bonds and BABs are issued to finance the same project, on what form or forms are these bonds to be reported?

A-2. The tax-exempt bonds should be reported on Form 8038-G or Form 8038-GC, as appropriate, and the BABs should be reported on Form 8038-B.

Q-3. If both RZEDBs and BABs are issued to finance capital expenditures for a single project, what form or forms should be filed to meet section 149(e) reporting requirements?

A-3. A separate Form 8038-B must be filed for BABs (Tax Credit), BABs (Direct Pay) and RZEDB's even if they constitute part of a single issue.

Q-4. If an issue of BABs contains both variable rate bonds and fixed rate bonds, must they be filed on separate Forms 8038-B?

A-4. No. When completing Form 8038-B, the issuer should follow the provisions of section 5.2 of Notice 2009-26 and the instructions to Form 8038-B. Both the variable rate and fixed rate bonds must be filed together on Form 8038-B. The issuer must attach separate, clearly labeled debt service schedules for the fixed-rate bonds and the variable-rate bonds.

Q-5. If drawdown BABs are issued, and the principal amount and interest payments for the interest payment dates are not known at the date of issue, but the interest rate on the bonds is fixed for two years, what information should the debt service schedule attached to Form 8038-B contain?

A-5. The debt service schedule attached to Form 8038-B should be clearly labeled as drawdown bonds and should reflect the debt service on the anticipated draw schedule. The debt service schedule should include the known debt service and enter the interest payment dates and anticipated outstanding principal amounts for the unknown periods. (If the interest payment is known in advance of an interest payment date, the issuer may file Form 8038-CP within the same timelines as fixed rate bonds.).

Q-6. What is the time frame for filing Form 8038-B?

A-6. To meet the reporting requirements of section 149(e) Form 8038-B must be filed on or before the 15th day of the second calendar month after the close of the calendar quarter in which the issue is issued. However, when an issuer is requesting payment of the credit on Form 8038-CP, Form 8038-B must also be filed 30 days prior to filing Form 8038-CP.

Q-7. What are the “sale proceeds” required to be reported under “Use of Proceeds of Issue” on Form 8038-B?

A-7. Section 54AA requires, among other things, that 100 percent of the excess of available project proceeds (defined in section 54A to mean sale proceeds of such issue less not more than 2 percent of such proceeds used to pay issuance costs plus investment proceeds thereon) over the amounts in a reasonably required reserve are to be used for capital expenditures. Sale proceeds are defined on Page 1 of the instructions to Form 8038-B and in section 1.148-1(b) of the Treasury Regulations.

Q-8. Are the irrevocable elections required by Sections 54AA(d)(1)(C) and (g)(2)(B) of the Code required to be submitted with Form 8038-B?

A-8. No. Section 4 of Notice 2009-26 specifies that the elections required by sections 54AA(d) and (g) are to be made on the issuer’s books and records on or before the issue date of the bonds. Each election may be evidenced using any reasonable method that establishes that the irrevocable election was made in a timely manner by the issuer. The format of such election is not prescribed and inclusion with any return is not required.

Questions and Answers Relating to Form 8038-CP

Q-9. If we file Form 8038-CP with our current address, even if it has changed since filing Form 8038-G or Form 8038-B, will we receive payment?

A-9. As noted in section 3.1(a) of Notice 2009-26, the IRS originally sent payments to the requested recipient’s “last known address”, as that phrase is defined and determined under section 301.6212-2 of the Treasury Regulations and Rev. Proc. 2001-18, 2001-18, 2001-1 C.B. IV, or any successor guidance even if it was not the address included on Form 8038-CP. However, the new Form 8038-CP permits credit payments to be sent either by direct deposit as authorized by the issuer or, if direct deposit is not elected by the issuer, by paper check to the addressee listed in Part I on the 8038-CP.

Q-10. May Form 8038-CP be filed earlier than 30 days after filing Form 8038-B if waiting the full 30 days would result in the issuer filing Form 8038-CP less than 45 days before the related interest payment date?

A-10. The thirty-day period described in section 5.2 of Notice 2009-26 is intended to provide the IRS sufficient time to process Form 8038-B before receiving Form 8038-CP, the return for direct payment credits related to the bond transaction being reported. In those cases where the thirty-day and forty-five day timeframes conflict, issuers may file their first Form 8038-CP less than thirty days after filing Form 8038-B. During processing of the Form 8038-CP, the IRS may

telephone the issuer, or its authorized representative, to inquire whether the Form 8038-B has been filed. The IRS may request that a copy of Form 8038-B be provided directly to the reviewer to avoid potential delays in processing the credit payments. However, do not include a copy of a previously filed Form 8038-B when submitting a Form 8038-CP.

Q-11. If both RZEDBs and BABs are issued to finance capital expenditures for a project, what form or forms should be filed to request the credit?

A-11. A separate Form 8038-CP must be filed for BABs (Direct Pay) and RZEDBs even if they constitute part of a single issue. One Form 8038-CP should be filed reflecting the 45% credit on the RZEDB portion of the issue; and another Form 8038-CP should be filed reflecting the 35% credit on the BAB portion of the issue.

Q-12. If an issue of BABs contains both variable rate bonds and fixed rate bonds, must they be filed on separate Forms 8038-CP?

A-12. Yes. If an issue of BABs contains both variable rate bonds and fixed rate bonds, separate Forms 8038-CP must be filed for variable rate bonds and fixed rate bonds. (These amounts should match the amount of the respective debt service schedules attached to Form 8038-B.)

Q-13. If a single issue consists of both fixed rate bonds and variable rate bonds as part of the same issue, when should the issuer file Form 8038-CP for the fixed rate portion?

A-13. Section 3.1(b) of Notice 2009-26 and the instructions for Form 8038-CP provide the timeframe for filing Form 8038-CP for fixed rate bonds (as opposed to a fixed rate issue). For fixed rate bonds, Form 8038-CP must be filed no later than 45 days before the related interest payment date but no earlier than 90 days before the related interest payment date.

Q-14. When should the issuer file Form 8038-CP for the variable rate portion?

A-14. The timeframes for filing Form 8038-CP for variable rate bonds is provided in section 3.1(c) of Notice 2009-26 and the instructions for Form 8038-CP. However, when the issuer knows the interest payment amount of variable rate bonds prior to the interest payment date, the issuer may file Form 8038-CP within the same timelines as fixed rate bonds (45 days before the relevant interest payment date but no earlier than 90 days before the relevant interest payment date). When completing the debt service schedule attached to the Form 8038-B for these types of bond issues, the issuer should include the known debt service and enter the interest payment dates and outstanding principal amounts for the unknown years.

When the issuer does not know the interest payment amount of variable rate bonds prior to the interest payment date, the issuer must aggregate all credit payments on a quarterly basis and file Form 8038-CP for reimbursement in arrears no later than 45 days after the last interest payment date within the quarterly period for which reimbursement is being requested.

Q-15. Is 35% of the amount of BAB accrued interest for the period between the dated date and the issue date of our bonds included on the first interest payment credit?

A-15. No. Pre-issuance accrued interest is considered a return of capital and not a payment for the use of money. As such, the 35% or 45% credits payable for interest on BABs and RZEDBs are not allowed for pre-issuance accrued interest. The amount of interest reported on Line 19 of Form 8038-CP should not include pre-issuance accrued interest. (When attaching the debt service schedules to Form 8038-B, do not include pre-issuance accrued interest.)

Q-16. If there is a filing error on Form 8038-CP or if it is incomplete, will the credit payment be processed?

A-16. When returns are incomplete or otherwise not able to be processed, the IRS will correspond with either the issuer or the entity listed in Part I of the 8038-CP, as necessary, to process the return. In certain instances, the IRS may contact an individual listed as the designated contact person on the form. However, the credit payment may be delayed as a result of filing errors.

Q-17. If Form 8038-CP is filed late, will the issuer still receive the credit payment?

A -17. Late filed returns will be processed; however, the credits may not be paid by the interest payment date to which they relate. Returns filed after the normal statutory period of limitation for claims may be barred. Generally applicable limitations on the accrual of interest on late filed returns apply.

Q-18. Can the trustee sign Form 8038-CP?

A.18. No. Form 8038-CP is a return of the issuer, and as such, must be signed by an officer of the issuer with the authority to: (i) bind the issuer; (ii) authorize payment to be sent to the entity listed in Part I; and (iii) authorize the IRS to communicate with any person listed as a designee of the issuer.

Q-19. Can the issuer designate a conduit borrower to receive the credit payment?

A-19. No. Section 6431 of the Code states the Secretary shall pay the credit to the issuer of the bonds, or to any person who makes such interest payments on behalf of the issuer. The person who makes interest payments on behalf of the issuer is generally the bond trustee or other designated paying agent. Accordingly, the IRS is authorized to make refund payments to the actual issuer of the bonds or to a trustee or paying agent who is making such interest payments on behalf of the issuer.

Q-20. How does the trustee, as recipient of credit payments from multiple issuers, identify the issuer to whom the payment relates?

A-20. The new Form 8038-CP allows the issuer the option of direct deposit. If the issuer elects direct deposit, the corresponding routing and account number will identify the issuer to the trustee. If the issuer does not elect direct deposit, trustees receiving credits may identify the issuer's credit check by the amount. When that is not possible, the issuer, or the trustee, if the trustee is authorized by the issuer on Form 8038-CP, may email the IRS office of Tax Exempt Bonds at the email above to secure the issuer's report number (the three digit number on Line 10 of the Form 8038-CP beginning with an "8" that is assigned by the Service Center during processing). The report number is listed on the paper check.

Q-21. If the issuer designates another representative to receive the credit payments in Part I of Form 8038-CP, such as a trustee bank, will the issuer's credit payment be subject to tax and other federal liability offsets of that designated representative?

A-21. No. The credit is paid with respect to the issuer of the bonds and liabilities of other entities are not considered for offset purposes.

Q-22. How do we confirm that the IRS received our Form 8038-CP?

A-22. The IRS is not currently sending confirmations of Form 8038-CP returns. However, the IRS intends in the future to issue confirmations to the issuer or to the representative of the issuer named in Part I of Form 8038-CP. Until such time, confirmations should not be requested for Form 8038-CP. The issuer may use certified mail, including the return receipt option, or use one of the many commercial delivery services available, such as FedEx, UPS, DHL, etc., where the tracking history may document receipt by the IRS. The street address required by commercial delivery services is:

Internal Revenue Service
Ogden Campus
1973 North Rulon White Blvd
Ogden, UT 84404

Q-23. – What is the procedure for obtaining BAB credit refund payment information?

A-23. To inquire about credit payments you will need to know the employer identification number of the entity listed in Part I of the Form 8038-CP return, the interest payment date to which the return relates, in the form YYYYMMDD period and the report number. If the return for fixed rate bonds or for variable rate bonds with a known interest payment amount was filed timely and the credit payment has not been received within seven days of the interest payment date, the issuer, or its authorized representative, should contact us. Questions regarding Form 8038-CP refunds may be submitted to the email address set forth in the introduction above.